IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR. JUSTICE K.HARIPAL

MONDAY, THE 04TH DAY OF JANUARY 2021 / 14TH POUSHA, 1942

CRL.A.No.705 OF 2020

CHALLENGING COMMON ORDER DATED 09.09.2019 IN CRL. M.P. NO. 56 OF 2020 IN S.C. NO. 1/2020/NIA OF THE SPECIAL COURT FOR TRIAL OF NIA CASES AT ERNAKULAM

APPELLANT/RESPONDENT-COMPLAINANT:

UNION OF INDIA
REPRESENTED BY NATIONAL INVESTIGATION AGENCY,
4TH CROSS ROAD, GIRINAGAR, KADAVANTHARA,
KOCHI-682020

BY ADV. SHRI.P.VIJAYAKUMAR, ASG OF INDIA

RESPONDENT/PETITIONER/2ND ACCUSED:

THWAHA FASAL
S/O. ABUBACKER, KOTTUMMAL HOUSE,
MOORKANAD, PANTHEERANKAVU,
KOZHIKODE-673 019

BY ADV. SRI.K.S.MADHUSOODANAN
BY ADV. SRI.THUSHAR NIRMAL SARATHY
BY ADV. SRI.M.M.VINOD KUMAR
BY ADV. SRI.P.K.RAKESH KUMAR
BY ADV. SRI.K.S.MIZVER
BY ADV. SRI.M.J.KIRANKUMAR
BY ADV. SRI.S RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-11-2020, ALONG WITH CRL.A.NO.706/2020, THE COURT ON 04-01-2021 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MR. JUSTICE K.HARIPAL

MONDAY, THE 04TH DAY OF JANUARY 2021 / 14TH POUSHA, 1942

CRL.A.No.706 OF 2020

CHALLENGING COMMON ORDER DATED 09.09.2019 IN CRL. M.P. NO. 55 OF 2020 IN S.C. NO. 1/2020/NIA OF THE SPECIAL COURT FOR TRIAL OF NIA CASES AT ERNAKULAM

APPELLANT/RESPONDENT-COMPLAINANT:

UNION OF INDIA
REPRESENTED BY NATIONAL INVESTIGATION AGENCY,
4TH CROSS ROAD, GIRINAGAR, KADAVANTHARA,
KOCHI-682020

BY ADV. SHRI.P.VIJAYAKUMAR, ASG OF INDIA

RESPONDENT/PETITIONER/1ST ACCUSED:

ALLAN SHUAIB
S/O. MOHAMMED SHUAIB
MANIPOORI HOUSE, PALATTU NAGAR
THIRUVANNUR,
KOZHIKODE-673029.

BY ADV. SRI.S.RAJEEV
BY ADV. SRI.K.K.DHEERENDRAKRISHNAN
BY ADV. SRI.V.VINAY
BY ADV. SRI.D.FEROZE
BY ADV. SRI.K.ANAND (A-1921)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-11-2020, ALONG WITH CRL.A.NO.705/2020, THE COURT ON 04-01-2021 DELIVERED THE FOLLOWING:

JUDGMENT

Haripal, J.

These are appeals preferred under Section 21(4) of the National Investigation Agency Act, Act 34 of 2008, challenging the correctness of the common order passed by the Special Judge for the trial of NIA cases, Ernakulam in Crl.M.P.Nos.55/2020 and 56/2020 in S.C.No.1/2020/NIA. The respondents, along with another person by name Usman, who is absconding, stand charged by the NIA for offences punishable under Section 120B IPC read with Sections 38 and 39 of the Unlawful Activities (Prevention) Act, 1967, hereinafter referred to as 'the Act'. Apart from the above, the second accused, who is the respondent in Crl.A.No.705/2020, faces allegation under Section 13 of the Act also.

2. The allegation is that, on 01.11.2019 at 6.45 p.m. while the Sub Inspector of Pantheerankavu police station, Kozhikode and party were engaged in routine law and order patrol duty, he noticed the respondents and the said Usman huddled together in darkness on the veranda of a shop; out of suspicion when the police approached them, the said Usman ran away and disappeared from the place who has not yet

been nabbed. Investigation of the case against him is continuing. The police seized objectionable printed and written materials from the respondents which include violent exhortations for civil war, in tune with Maoist ideology. They were taken to the police station and Crime No.507/2019 of Pantheerankavu police station was registered against the three accused persons alleging offences punishable under Sections 20, 38 and 39 of the Act along with Section 120B IPC. That night itself the residences of the respondents were searched and more incriminating materials were traced from their possession. According to the prosecution, such materials were more volatile, even exhorting secession of the country after liberating Jammu & Kashmir. Materials creating unrest in society also could be found out. Thus it became very clear that the respondents were activists of the banned CPI(Maoist). At the time of searching the residence of the second accused, he shouted slogans supporting Maoist ideology. Since the materials found out from the possession of the respondents were grave enough to pose threat to national security, by order dated 16.12.2019 the Ministry of Home Affairs, Government of India entrusted investigation of the case with the NIA. During the course of investigation, though the respondents had

moved the courts seeking bail, they were rejected by the trial court as well as this Court. On conclusion of investigation, the final report has been laid against the respondents and the said Usman alleging offence punishable under Sections 38 and 39 of the Act read with 120B IPC besides Section 13 against the second accused.

3. After laying the charge sheet the respondents moved the trial court again with the said Crl.M.Ps. The learned Special Judge, by the impugned order, granted them bail, imposing conditions. That order is now under challenge.

4. We heard Sri.P.Vijayakumar, the learned Assistant Solicitor General of India and Sri. Arjun Ambalappatta, the learned senior Public Prosecutor for the NIA besides Sri.S.Rajeev and Sri.K.S.Madhusoodanan, the learned counsel for the respondents.

5. The learned Assistant Solicitor General has raised caustic criticism against the order under challenge. According to him, the learned Special Judge lost sight of the purport of the Act and showed over-enthusiasm in granting bail to the respondents; the court was proceeding on wrong assumptions. At the stage of considering the application for bail, the learned Judge should not have gone deep,

disintegrating all the material pieces of evidence for concluding that there is no prima facie case in favour of the prosecution. The court has considered evidence as if in a trial; such detailed analysis was not warranted, the documents relied on by the prosecution should have been taken as true and a deeper enquiry is not expected for deciding the application for bail. Both the counsel representing the appellant complained that the court has not properly understood the intention of the legislature. The object of the Act is to prevent unlawful activities; even if overt acts are not proved, that is not an impediment in finding prima facie case as far as offences under Sections 38 and 39 of the Act are concerned. The learned Assistant Solicitor General also complained that the trial judge was placing reliance on authorities having no bearing in this case. According to him, even though the decision reported in **National Investigation Agency v. Zahoor Ahmad Shah Watali [AIR 2019 SC 1734] : [(2019) 5 SCC 1]** was also relied, it was not properly understood and applied. He further argued that the learned Special Judge has mistaken the activities of a terrorist organisation and the gravity of the offence has been diluted for granting bail. According to him, the cumulative effect of the materials found out from the possession of the

respondents should not have been overlooked by the court.

6. On the other hand, the learned counsel for the respondents defended the order of the learned Special Judge. According to them, the court has granted them bail after eleven months of incarceration. The import of each and every material relied on by the prosecution has been examined in the light of Section 43-D(5) of the Act. Counsel for the second accused/respondent in Crl.A.705/2020 filed a detailed objection also.

7. Both the learned counsel for the respondents have challenged the very maintainability of the appeals. According to them, the appeal memoranda have been signed by the Superintendent of Police, NIA Kochi and the appeals were presented before court by the Assistant Solicitor General of India who is not a Public Prosecutor as defined under Section 24(1) of the Code of Criminal Procedure, hereinafter referred to as 'the Code'. In this connection, the counsel also relied on the decisions of this Court in **State of Kerala v. Krishnan [1981 KLT 839]** and **Benny P. Jacob and another v. Rajesh Kumar Unnithan and another [2019 KHC 737].** To meet this contention, the learned Special Prosecutor for the NIA produced a copy of the Gazette of India dated 12.09.2011.

8. As noticed earlier, the respondents stand charged by the NIA alleging offence punishable under Sections 38 and 39 of the Act r/w Section 120B IPC. Apart from the above, the second accused, who is the respondent in Crl.A.No.705/2020, faces allegation under Section 13 of the Act as well.

9. It is the common case that the respondents were arrested by the Sub Inspector of Police, Pantheerankavu police station at 6.45 p.m. on 01.11.2019 from a place by name Kottayithazham in Kozhikode city, when they were found, along with the absconding accused, in suspicious circumstances. As they carried some offensive literature, Crime No.507/2019 was registered and both were remanded to judicial custody. While so, having regard to the nature and magnitude of the offence revealed against them, the investigation was taken over by the NIA. When the investigation was in progress the respondents moved applications for bail which were rejected by the Sessions Judge, Kozhikode. Against that order when the respondents moved this Court under Section 21(4) of the NIA Act, those appeals were dismissed by this Court as per the judgment reported in **Thwaha Fasal and another v. State of Kerala and others (MANU/KE/5104/2019)** in which one of us

(Hariprasad, J) was party. Meanwhile, the charge sheet was laid as aforestated and thereafter they moved fresh applications for bail before the Special Judge which were allowed by the impugned common order.

10. In his detailed order, the learned Special Judge, after considering various aspects and after analysing each and every material evidence projected against the respondents, concluded that the prosecution could not make out prima facie case against them, that they have not indulged in any specific terrorist act or act of violence. In that view, he allowed the applications and released them on bail imposing certain conditions. Aggrieved by the same, Union of India represented by the National Investigation Agency has preferred these appeals.

11. The allegations against the accused are briefly as follow:-

> 'a) Accused 1 to 3 had knowingly and intentionally, associated themselves and acted as members of Communist Party of India (Maoist), proscribed as a terrorist organisation by the Government of India under Section 35 of the Unlawful Activities (Prevention) Act, 1967 and included in the I Schedule to the Act, thereby committed the offence punishable under Section 38 of the Act;
>
> b) Accused 1 to 3 had knowingly and intentionally, possessed documents supporting and published by

CPI(Maoist), possessed digital devices and other materials with the intention of supporting the proscribed terrorist organisation and propagating its violent extremist ideology and thereby committed the offence punishable under Section 39 of the Act;

c) Accused 1 to 3 had knowingly and intentionally, attended various conspiracy meetings along with other underground part-time and professional members of CPI(Maoist). They had attended various programmes organised by the frontal organisations of the proscribed terrorist organisation, for furthering the objectives of CPI(Maoist) and thereby committed the offence punishable under Section 120B of IPC;

d) Accused No. 2, in furtherance of the conspiracy, with co-accused and others, had knowingly and intentionally, prepared cloth banners supporting secession of Kashmir from the Indian Union, for displaying at public place and thus committed the offence of unlawful activity punishable under Section 13 of the Act.'

12. It is further stated that 'investigation revealed that A1 and A2 had nurtured Maoist ideology since 2015-16 and had subsequently, knowingly and intentionally associated with the proscribed terrorist organisation CPI(Maoist), with the intention of furthering its objectives. The accused had conspired and propagated the ideology of the terrorist

organisation among their friends, while attempting to radicalize and recruit such persons into the proscribed organisation. The accused have conducted clandestine meetings in Kozhikode and Kannur districts, besides knowingly and intentionally attended various conspiracy meetings with underground professional members and leaders of CPI(Maoist) party, like A3. A1 and A2 have also attended various programmes organised by the frontal organisations of CPI(Maoist), with the intention of furthering the objectives of the proscribed terrorist organisation'.

13. It is not disputed that Communist Party of India (Maoist) is an outfit proscribed under Section 35 of the Act.

14. The argument of the learned counsel for the respondents that the appeals are not maintainable, can be considered at the outset. It is true that the learned ASG has not been notified as a Public Prosecutor as defined under Section 24 of the Code. The appeal memoranda are signed by the Superintendent of Police, NIA Cochin Unit, who re-registered the crime in Cochin Unit of the NIA. In that capacity, his name appears in the list of witnesses as witness No.91. The appeals were presented by the ASG and Sri. Arjun Ambalappatta in his capacity as the Public

Prosecutor. The notification referred to above dated 12.09.2011 published in the Gazette of India of even date reads thus:-

> **"MINISTRY OF HOME AFFAIRS**
> (INTERNAL SECURITY-I DIVISION)
> **NOTIFICATION**
> New Delhi, the 12th September, 2011
>
> **S.O. 2070(E)-** I*n exercise of the powers conferred by sub-section* (1) of Section 15 of the National Investigation Agency Act, 2008 (34 of 2008), read with sub-section (8) of Section 24 of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby appoints Shri Ahmad Khan, Senior Public Prosecutor, NIA, Shri S K Rama Rao, Senior Public Prosecutor, NIA, Shri S Abdul Khader Kunju, Public Prosecutor, NIA and Shri Arjun Ambalapatta, Public Prosecutor, NIA as 'Public Prosecutors' for conducting the cases instituted by the National Investigation Agency in the trial courts, appeals, revisions or other matters arising out of the case in revisional or appellate courts established by law of the country.
>
> [F. No.1-11011/65/2011-IS-IV]
>
> DHARMENDRA SHARMA, Jt.Secy"

In other words, Sri. Arjun Ambalappatta stands appointed as the Special Public Prosecutor, NIA under Section 24(8) of the Code, and thus entitled to conduct cases instituted by the NIA, in trial courts, appeals, revisions or other matters arising out the case in courts established by the law of the country. Dockets of the appeals bear the names of both the ASG and the

Public Prosecutor. When a Public Prosecutor is appointed under sub-section (2) or (8) of Section 24 of the Code, there is no point in saying that, his appointment is without consulting the High Court. Moreover, Section 15 of the NIA Act also enables the Central Government to appoint a person, subject to the qualifications provided in sub-section (2), to be the Public Prosecutor and may appoint one or more persons to be Additional Public Prosecutor or Additional Public Prosecutors. That means, even though the ASG is not a Public Prosecutor as defined under Section 2(u) read with Section 24 of the Code, the challenge against the maintainability of the appeals cannot be sustained since the appeals are signed by the Superintendent of Police and presented by the Public Prosecutor appointed under Section 15 of the NIA Act read with Section 24(8) of the Code.

15. Now, turning to the merits, Sections 13, 38 and 39 of the Act can be extracted:-

> "**13. Punishment for unlawful activities.—**(1) Whoever—
> (a) takes part in or commits, or
>
> (b) advocates, abets, advises or incites the commission of, any unlawful activity, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

(2) Whoever, in any way, assists any unlawful activity of any association, declared unlawful under section 3, after the notification by which it has been so declared has become effective under sub-section (3) of that section, shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

(3) Nothing in this section shall apply to any treaty, agreement or convention entered into between the Government of India and the Government of any other country or to any negotiations therefor carried on by any person authorised in this behalf by the Government of India.

38. Offence relating to membership of a terrorist organisation.—

(1) A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation:

Provided that this sub-section shall not apply where the person charged is able to prove—

(a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(b) that he has not taken part in the activities of the organisation at any time during its inclusion in the First Schedule as a terrorist organisation.

(2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

39. Offence relating to support given to a terrorist organisation.—

(1) A person commits the offence relating to support given to a terrorist organisation,-

(a) who, with intention to further the activity of a terrorist

organisation,-

(i) invites support for the terrorist organisation, and

(ii) the support is not or is not restricted to provide money or other property within the meaning of section 40; or

(b) who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which he knows is-

(i) to support the terrorist organisation, or

(ii) to further the activity of the terrorist organisation, or

(iii) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or

(c) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.

(2) A person, who commits the offence relating to support given to a terrorist organisation under sub- section (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both."

16. In **Thwaha Fasal**, quoted supra, referring to Sections 38 and 39 of the Act, this Court observed as follow:-

"13. Section 38, on the other hand, deals with punishment of a person, who associates himself or professes to be associated with a terrorist organisation with an intention to further its activities, thereby commits an offence relating to membership of a terrorist organisation. Proviso to that Section may not be relevant at this stage of the case. It is evident that a person knowingly or consciously associating

> with a terrorist organisation and a person who professes to be associated with a terrorist organisation will be punishable, if he does so with an intention to further its activities, as he commits an offence relating to membership of a terrorist organisation. We are inclined to think that the words “associated” and “professes to be associated” occurring in Section 38 of the UA(P) Act are employed in a broad sense and with a specific purpose. Anybody indulging in such activities will normally do so clandestinely or surreptitiously. Contextually therefore, not only overt actions, but covert actions may also at times satisfy the ingredients of the Section, provided they were done knowingly or consciously for the objectives mentioned in the Section. …..
>
> 14. Section 39 of the UA(P) Act deals with punishment for support given to a terrorist organisation. On a reading of the Section, it will be clear that the support must be intentional and it should be for furtherance of the activity of a terrorist organisation.”

Both are cognate offences. In our view, if there are materials to infer that the accused have done something to promote or enthuse the activities of a terrorist organisation or done anything supporting its activities with the intention to further its activities, these offences are attracted.

17. Offences under Sections 38 and 39 of the Act fall within Chapter VI of the Act. In this connection, Section 43-D(5) of the Act reads thus:-

> "**43D. Modified application of certain provisions of the Code.-** xxx xxx xxx xxx (5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:
>
> Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."

In other words, whenever an offence falling under Chapters IV and VI of the Act is alleged against the accused, on perusal of the case diary or the final report that there are reasonable grounds for believing that the accusation against the said person is prima facie true, the Act restrains the court from releasing him on bail. The Hon'ble Supreme Court in **National Investigation Agency v. Zahoor Ahmed Shah Watali [(2019) 5 SCC 1]** has observed as follows:-

> "18. A priori, the exercise to be undertaken by the Court at this stage of giving reasons for grant or non-grant of bail is markedly different from discussing

> merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the Accused in the commission of the stated offence or otherwise. …..."

According to the Hon'ble Court, the opinion regarding the grant or otherwise of the bail must be reached by the courts not only in reference to the accusation in the FIR but also in reference to the contents of the case diary including the charge sheet and the other material gathered by the investigating agency. Regarding the application of Section 43-D of the Act the Court noted thus:-

> "18. ….. Be it noted that the special provision, Section 43D of the 1967 Act, applies right from the stage of registration of FIR for offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof. To wit, soon after the arrest of the Accused on the basis of the FIR registered against him, but before filing of the chargesheet by the Investigating Agency; after filing of the first charge-sheet and before the filing of the supplementary or final chargesheet consequent to further investigation under Section 173(8) Cr.P.C., until framing of the charges or after framing of the charges by the Court and recording of evidence of key witnesses etc. However, once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the

> Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the Accused may have to undertake an arduous task to satisfy the court that despite the framing of charge, the materials presented along with the chargesheet (report under Section 173 of Cr.P.C.), do not make out reasonable grounds for believing that the accusation against him is prima facie true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case.
>
> 19. For that, the totality of the material gathered by the Investigating Agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is."

18. After going through the impugned order, we have no doubt that there is force in the submission of the learned Assistant Solicitor General and the Public Prosecutor for the NIA that the learned Special Judge had ventured to make a thorough, threadbare analysis into each and every document relied on by the prosecution, as if in a trial. In other words, there is substance in the contention that the learned Judge has

overstepped while deciding to release the respondents on bail.

19. We do not approve the approach made by the learned Special Judge. He is of the firm view, basing on the authorities, that bail is the rule and jail, exception. Even though that is the general perception in ordinary crimes, when the accused faces allegation under a special enactment, his right to be enlarged on bail shall be governed by the provisions of the special statute. In such cases, the provisions under the Code cannot be readily applied. As noticed earlier, Section 43-D(5) of the Act is an exception to the provisions of the Code, which postulates modified applications of certain provisions of the Code. It starts with a non obstante clause. When offence under Chapters IV and VI of the Act is alleged, the court shall not grant bail unless giving liberty to the Prosecutor to address the court. Further, the proviso to Section 43-D(5) works as a statutory injunction on the court in granting bail; if there are prima facie circumstances to believe that the allegations are true, bail cannot be granted as a rule. The Hon'ble Apex Court in **Watali** (quoted supra) has stated how the materials placed before court have to be understood while considering an application for bail.

20. The Act was enacted for the purpose of combating and

controlling unlawful activities and acts of terrorism and related activities. Though the Act had come into existence in 1967, drastic amendments were made in 2008 and 2013. Section 43-D was brought into the statute in 2008 to meet the contingencies of the changed circumstances. Terrorist acts or acts prompting or assisting such activities have been taken serious note of by the legislature and that was how stringent provisions have been incorporated in the matter of grant of bail, especially when certain category of offences are attracted. In such situations, the powers of the Sessions Court as well as that of this Court under Section 439 stand circumscribed. What we endeavour to say is that the principle, bail is the rule and jail the exception, has no application in such a case, especially when the offences under Chapters IV and VI of the Act are alleged against the accused. In this connection, the decisions of the Hon'ble Supreme Court in **Narcotic Control Bureau v. Kishan Lal and others [AIR 1991 SC 558]** and **Union of India v. Ikram Khan and others [(2000) 9 SCC 221]** rendered in the background of Section 37 of the NDPS Act require to be mentioned.

21. Having said that the Special Judge ought to have considered the import of Section 43-D(5) of the Act, now the second aspect is

whether there exist prima facie grounds to say that the accusations against the appellants are true.

22. In order to form an opinion on this, it is not necessary to delve deep into material documents one after another, as done by the learned Special Judge. The Apex Court has in **Watali**, quoted supra, made it succinctly clear as follow:-

> "17. ..... By its very nature, the expression "prima facie true" would mean that the materials/evidence collated by the Investigating Agency in reference to the accusation against the concerned Accused in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such Accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the court has to opine that the accusation is "prima facie true", as compared to the opinion of Accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the court for opining that there are reasonable grounds for believing that the accusation against the Accused is prima facie true, is lighter than the

> degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act. …....”

As rightly pointed out by the learned ASG, the learned Judge has failed to notice the cumulative effect of the documents and materials seized from the possession of the respondents. The learned Judge has categorised the documents into 12 and said that those documents do not make out a prima facie case to proceed against the respondents. But after going through the material documents and also bearing in mind the authorities on the subject, we are unable to subscribe to the view. Various documents were seized from the respondents. The learned counsel for the respondents wanted to impress us that such materials, if at all found in the possession of the respondents, were carried by them out of their curiosity to know about the philosophy of the CPI(Maoist), that it might be the affinity of the youth in the tender age to know novel ideologies and that no criminal intention can be attributed. It was pointed out that the first accused is a law student, only 19 years old at the time of registration of the crime, whereas the second accused is a student in Journalism, aged 23 years. Even though they are youth and such a

proposition is also probable, we cannot ignore the fact that the respondents had carried only such type of literature or writings which were published by the CPI(Maoist) which is admittedly a proscribed, underworld organisation.

23. We have already stated in brief the necessary ingredients of the offences under Sections 38 and 39 of the Act. The respondents had carried numerous writings and literature published by the said organisation or by those who have strong allegiance to the outfit. That means, the contention that the respondents had carried such materials out of their youthful inquisitiveness and quest for understanding new ideologies and curiosity does not carry any weight. If they, as youngsters were interested in understanding and assimilating new and novel ideologies, a bunch of materials published by a particular outfit alone would not have been found in their possession and power. The underlying element of mens rea cannot be overlooked. Therefore, this circumstance alone is sufficient to say, at least at this stage, that they are protagonists of the organisation.

24. There is also considerable force in the argument of the learned counsel for the appellant that the trial Judge has failed in

understanding terrorist acts *vis-a-vis* the activities of a terrorist organisation. We have noticed that the learned Judge has repeatedly used terms like 'terrorist activities' (*paragraph 49, 54, 56 and 70*), 'terrorist attacks' (*paragraph 70*), 'violent act' (*paragraph 75) 'violence' (paragraph 90*), 'overt act of violence' (*paragraph 75, 76 and 85*), 'terrorist act' (*paragraph 80 and 88*) in the impugned order. It appears that the Judge was under the mistaken notion that in order to attract the alleged offences, such violent acts were necessary. But the prosecution has no case that the appellants are members of a terrorist organisation. Though the crime was originally registered alleging offence punishable under Section 20 of the Act as well, after investigation that provision stands deleted. Similarly, the prosecution has no allegation that the respondents have indulged themselves in any terrorist act, as defined in Section 15 of the Act. A terrorist act and acts which further the activities, by promoting and assisting activities of such terrorist organisation by persons who associate themselves or profess to be associated have to be seen differently. Separate provisions have been incorporated in the statute to meet such contingencies.

25. The learned Special Judge has not considered the other pieces

of evidence which include the oral testimony of witnesses recorded by the investigating officer, relied on by the prosecution. Apart from the documents and electronic gadgets seized from the possession of the respondents, witnesses have spoken that the respondents had close association and rapport with persons having close link with the banned organisation. There are also ocular evidence to say that they were regularly attending meetings of such organisations. In the light of the directives given by the Hon'ble Apex Court, these matters cannot be eschewed but are relevant while considering the question as to whether the accused are entitled to be released on bail.

26. There is also substance in the contention of the learned counsel for the appellant that the trial Judge has oversimplified the materials seized from the possession of the respondents. There are documents which are innocuous on the face of it; at the same time, there are other documents which are highly inflammable and volatile. After rushing through the materials we are only to say that, generally speaking, some of those materials are not innocent and innocuous which could be ignored in a light-hearted manner. True, the prosecution could not prove that the respondents are members of an unlawful organisation. But these

are surreptitious activities for which evidence may not be readily available, in black and white. Everything is done under the carpet, behind the curtain, without leaving any footprint. Matters have to be inferred from the circumstances. The statement of witness Nos.56, 57, 58, 63 and 64 have to be considered in this context. Statements of some of the witnesses suggest that the respondents used to take photocopies of such documents. Similarly, the documents seized from the respondents cannot be seen in isolation. D17 document alone is sufficient to understand the modus operandi of the outfit. It is seen that they consider the administrative set up of the Government and the police as their foes. The strategies adopted by them to further the activities of the outfit are vividly given in the guidelines regarding the movements of the activists, how meetings should be convened, guidelines regarding use of electronic gadgets, use of internet, computer, social media etc., and how precautions are to be taken. This document also envisages two types of comraderie- 'parasya sakhakkal' and 'rahasya sakhakkal' that is, comrades working overtly and covertly. By no stretch of imagination it could be thought that such types of documents were carried by the respondents out of mere curiosity or intellectual pursuit of new ideologies.

27. After perusing D17 document an important aspect came to the fore is that the respondents did not carry their mobile phones while they were arrested. It is very conspicuous. This document is sceptical about telephone tapping, tracing a person in transit through phones, etc. It cautions its activists and reminds that all communications shall be done discretely only. It is not that both of them do not have mobile phones. Their mobile sets were seized from the respective residences, after the search. So in all probability, the respondents were keeping their mobile phones at home, obeying the diktat.

28. It was pointed out by the learned counsel for the respondents that publication of these materials have not been banned and carrying them cannot be described as an offence. We are unable to subscribe to the argument. Firstly, it is not disputed at this stage that these are publications made by a banned outfit. Secondly, once such an organisation stands proscribed, it cannot be heard to say that each and every publication made by them should stand prohibited separately. Moreover, as hinted earlier, carrying such documents cannot be reckoned in isolation. This together with the oral testimony of witnesses do suggest prima facie that the respondents were protagonists of such an ideology.

29. Moreover, at least in one instance, 15 copies of the literature were found in the possession of the second accused. It is a very strong circumstance capable of drawing adverse inference against the respondents to say that such items were carried with clear intention, for the purpose of circulation.

30. The learned Special Judge has relied on numerous authorities to fortify his conclusion regarding the grant of bail to the respondents. Even though he had noticed **Watali** as well, noted supra, did not choose to follow the law laid down by the Supreme Court on the subject which holds the field. It is binding under Article 141 of the Constitution. If the directions in the case were properly understood and applied, we are sure, the decision would have been different. It is the latest authority on the subject which is based on earlier decisions of the Apex Court.

31. The subsequent conduct of the second accused also should have been taken serious note of by the trial court. It is the specific allegation of the prosecution that after having arrested and taken to his residence for conducting a search, the second accused was shouting slogans in support of the CPI(Maoist). This conduct is relevant for the present purpose.

32. The second accused faces offence under Section 13 of the Act also for having carried two banners seeking independence of Jammu & Kashmir. Documents carried by the respondents depict Jammu & Kashmir as a neighbouring country. We are unable to approve the argument of the learned counsel that this has to be viewed in the light of the protests emerged against the amendment of the Constitution which conferred status of Union Territory on Jammu & Kashmir. In our view, the said documents carry the seeds of a secessionist ideology and the very Act is intended to compact such activities.

33. On evaluation of the entire circumstances and materials we find it difficult to uphold the order under challenge. As rightly pointed out by the learned Asst. Solicitor General and the Public Prosecutor, the Special Judge has oversimplified the matters and watered down the seriousness of the documents seized from the respondents or the statements of witnesses spoken against them. Therefore, the order warrants interference under Section 386 of the Code.

34. The learned counsel for the respondents cited very many authorities as if it is the proceedings for cancellation of bail. In fact we are not on the question. We are sitting in appeal over the correctness of

the order granting bail to the respondents. As held by a Full Bench of this Court in **Mastiguda Aboobacker and another v. National Investigation Agency and others [2020 (6) KHC 265 (F.B.)]** in which one of us was party (Hariprasad, J), in the absence of prescribed special procedure for investigating, enquiring into or trying the offences under the NIA Act, provisions under the Code will prevail since the NIA Act is intrinsically interlinked with the provisions of the Code. That means, powers of this Court under Section 386 of the Code will govern the subject.

35. It also requires to be stated that very many authorities were relied on by the learned Special Judge outside the context. While considering the question whether there is prima facie material to infer commission of offence under Sections 38 and 39 of the Act, the court should have confined to the area of enquiry instead of going haywire. We have no doubt that rights and personal liberty are sacrosanct. Courts are bound to protect it. At the same time, individual rights should subserve the national interest. When individual rights are pitted against national interest and security, the latter should prevail.

36. In the result, the order of the trial court granting bail to the

respondents cannot be sustained. But after considering the case of the first accused, who is the respondent in Crl.A.706/2020, we are of the view that there are numerous mitigating circumstances in his favour. Firstly, on the date of detection of the crime, he was only 20 years old. Secondly, referring to copies of the prescription produced along with the bail application the learned Special Judge has noted that he has some psychiatric issues for which treatment is underway. While considering the appeals, we give more importance on this aspect. Moreover, materials placed before the court, seized from him, are less serious, compared to the materials seized from the possession of the second accused; again the subsequent conduct of the second accused is also blameworthy. That means, we do not propose to reverse the order so far as the first accused is concerned, who shall continue on bail on the same terms and conditions imposed by the Special Judge, whereas Crl.A.No.705/2020 will stand allowed and that part of the order granting bail to the second accused is reversed. He will surrender before the Special Judge forthwith, failing which the Special Court shall take steps to secure him in custody.

37. In the light of the above finding, the learned Special Judge is

directed to try and dispose of S.C.No.1/2020 pending before court as expeditiously as possible, within one year from the date of receipt of a copy of this judgment.

38. It goes without saying that, various observations/comments made hereabove are for the limited purpose of disposing of these appeals. The Special Judge shall try and dispose of the case uninfluenced by such observations/comments.

39. We would also like to remind the learned Judge that the impugned order has been prepared as if it is a court of record which was unnecessary. Similarly, the learned Judge, while quoting some judgments of the Apex Court, has stated the names of the Hon'ble Judges who authored the judgments which is unwholesome.

The appeals are disposed of as above.

Sd/-
A. HARIPRASAD
JUDGE

Sd/-
K. HARIPAL
JUDGE

okb/14/12/2020

//True copy// P.S. to Judge